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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI
FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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PETITION FOR WRIT OF CERTIORARI FILED MAY 30, 1990
CERTIORARI GRANTED JANUARY 7, 1991

QUESTION PRESENTED FOR REVIEW

Whether, under this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), preclusive effect should be given to a judicially unreviewed state agency finding of no probable cause so as to bar a subsequent action in federal court under the Age Discrimination in Employment Act of 1967?

LIST OF PARTIES PURSUANT TO RULE 24.1(b)

The parties to the proceedings below were Petitioner, Astoria Federal Savings and Loan Association, and Respondent, Angelo J. Solimino. Briefs *amicus curiae* were filed in the Court of Appeals by the Equal Employment Opportunity Commission and the American Association of Retired Persons. Counsel for the parties and counsel for the Equal Employment Opportunity Commission presented oral argument to the Court of Appeals.

LISTING OF AFFILIATED ENTITIES PURSUANT TO RULE 29.1

Astoria Federal Savings and Loan Association has no parent company, but has the following wholly owned subsidiaries:

AF Equities Corp.
AF Staten Island Development Corp.
AF Roosevelt Avenue Corp.
AF Astoria Corp.
AF Woodside Corp.
AF Glen Cove Corp.
AF Cortland Corp.
AF Agency, Inc.

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CITATION OF THE OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 901 F.2d 1148 (2d Cir. 1990), and is reprinted in the Appendix to the Petition beginning at (A.11)[1] The opinion of the United States District Court for the Eastern District of New York is reported at 715 F.Supp. 42 (E.D.N.Y. 1989), and is reprinted in the Appendix at (A.14) and in its memorandum and order form at J.A. 141. The judgment of the District Court is reprinted in the Joint Appendix at J.A. 158.

STATEMENT OF GROUNDS OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on April 12, 1990. This Court exercised jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA") and the New York Human Rights Law, N.Y. Executive Law, §§ 290-301 (N.Y. McKinney's Consol. Laws 1982 & Supp. 1990). The pertinent sections of these statutes are reprinted in the Appendix to the Petition, at pages A.30-A.43. Sections 297 and 297-a of the New York Human Rights Law are reprinted in the Joint Appendix at J.A. 159-J.A. 170.

Pertinent portions of the ADEA cited in this brief are:

Section 14(a), 29 U.S.C. §633(a), which states:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.;

---

[1] References preceded by an "A." are to page numbers of the Appendix to the Petition for Writ of Certiorari herein. References proceeded by "J.A." are to page numbers of the Joint Appendix herein.

Section 14(b), 29 U.S.C. § 633(b), which states:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.;

and, Section 7(d), 29 U.S.C. §626(d), which states:

> (d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed–
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

On March 5, 1982, Angelo J. Solimino ("Solimino"), then a Vice President of Petitioner, Astoria Federal Savings And Loan Association ("Astoria") in its Mortgage Origination Department, was terminated from that employment. He was 63 years old. (A.3; 901 F.2d at 1149).

Less than two weeks later, on March 18, 1982, Solimino filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was discriminated against because of his age when he was discharged. The EEOC referred the matter to the New York State Division of Human Rights pursuant to a worksharing agreement between the two agencies. Treating the case as a potential violation of both the ADEA and the State Human Rights Law, N.Y. Exec. L., §§ 290-301, which also bars age discrimination in employment, the New York State Division of Human Rights ("DHR") assigned the matter to a staff member for investigation. (A.3; *Id.*).[2]

On October 5, 1982, the DHR human rights specialist who investigated the matter issued her Investigation Report summarizing the positions of the parties and the evidence adduced in the matter up to that time. (J.A. 128). On November 29, 1982, she conducted a hearing (a so-called "fact finding conference") on the allegations in the charge. (A.3; J.A. 34). The hearing was attended by both parties and their counsel. At Solimino's request, witnesses presented by each party gave sworn testimony. (A.3; *Id.*). A stenographic shorthand reporter was present, also at Solimino's request, to record the proceeding. A transcript of approximately eighty pages resulted from the testimony of the

[2] The charge form which Solimino filed with the EEOC had the name of the "NYS Division of Human Rights" inserted just below the printed name of the Commission, and although it specifically alleged age discrimination, it did not cite either the ADEA or the State Human Rights Law as a basis for jurisdiction. Thus, it appears that the charge was intended to invoke simultaneously the respective jurisdictions of both agencies. The DHR's handling of the matter resulted in a consolidated, concurrent disposition of the case under federal and state laws. (J.A. 31-J.A. 33).

five witnesses (including Solimino and the president of Astoria) and the arguments of the parties' counsel. (J.A. 34-J.A. 88). Both sides had an opportunity to examine and cross-examine witnesses and present argument on behalf of their respective positions.

On January 25, 1983, after concluding its investigation, the DHR rendered its Determination and Order after Investigation, finding that no probable cause existed to believe that the alleged age discrimination had occurred and dismissing the complaint. (A.3; J.A. 89-J.A. 91; 901 F.2d at 1149). Solimino appealed to the State Human Rights Appeal Board. (J.A. 92-J.A. 94). On May 30, 1984, after giving Solimino the opportunity to submit a brief and to present oral argument, the Appeal Board affirmed the DHR's determination. (A.3-A.4; J.A. 95-J.A. 98).[3] Solimino never sought judicial review of the DHR's finding, although he had the right to do so under New York law. (A.4; *Id.*).

In a formal Notice accompanying its Order, the Appeal Board advised Solimino of his right to seek judicial review. (A.44; J.A. 95).[4]

On July 29, 1983, during the pendency of his appeal before the Appeal Board, Solimino began an action in New York State Supreme Court, New York County, against five Astoria officers, Petitioner's lawyers and two DHR employees, alleging wrongful termination, prima facie tort, perjury and conspiracy. While the allegations involved Solimino's discharge and his age

[3] The Appeal Board, a quasi-judicial appellate forum separate from the DHR, was abolished in 1985. Appeals from DHR orders dismissing a complaint are now taken to the New York State Supreme Court, at its trial-court level, for review to determine whether the findings of fact are "supported by sufficient evidence on the record considered as a whole." (N.Y. Human Rights Law, Exec. L. § 298, L. 1985, c.340, § 1. N.Y. Exec. L. § 297-a, which governed the Appeal Board, is reprinted at J.A. 168-J.A. 170).

[4] The Notice also cautioned aggrieved litigants:

> A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer v. Chemical Construction Company*, 456 U.S. 461 (1982).

(A.44; J.A. 95).

discrimination charge, this action did not specifically request judicial review of the DHR's findings. (A.4; 901 F.2d at 1145). The Supreme Court dismissed the complaint against some of the defendants on April 18, 1984, and as to the remaining defendants on May 10, 1984. (Copies of the State Supreme Court opinions are set out at J.A. 99-J.A. 105). The Appellate Division of the Supreme Court affirmed these dismissals a year later. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dept. 1985)(A.4; J.A. 106-J.A. 107).

On February 21, 1985, Solimino commenced this action against Astoria in the United States District Court for the Eastern District of New York, maintaining that Astoria Federal had discriminatorily denied him promotions and raises, and had discharged him, because of his age, in violation of the ADEA. (A.4). On February 23, 1989, Astoria moved for summary judgment on the grounds that it was untimely and that the DHR's prior judicially unreviewed finding that Solimino's treatment as an employee and termination did not result from age discrimination precluded Solimino's federal suit under the ADEA. (A.4; 901 F.2d at 1150).

The District Court granted Astoria's motion on grounds of administrative estoppel.[5] It agreed that the DHR hearing and determination, although unreviewed by the state courts, had a preclusive effect on Solimino's ADEA federal court action. (A.19). The District Court concluded that common law rules of preclusion applied to the DHR proceedings and that nothing in the ADEA overcame the presumptively preclusive effect of the state agency findings. (A.27-A.28). The Court also rejected Solimino's argument that the state agency hearing failed to meet the requirements of due process, and found that the DHR findings bound the Court. (A.28-A.29).

The Court of Appeals reversed. Persuaded from its review of the ADEA "that Congress intended that a finding of no discrimination by a state agency which has not been judicially

[5] It rejected that part of Astoria's motion based on statute of limitations grounds. (A.16-A.18). The statute of limitations issue was not raised in the Court of Appeals and is not before this Court.

reviewed should have no preclusive effect in federal court" (A.6; 901 F.2d at 1150), it remanded the case for further proceedings. (A.13).[6]

This Court granted Astoria Federal's petition for a writ of certiorari on January 7, 1991.[7]

STATEMENT OF THE ARGUMENT

This Court should vacate the Second Circuit's order and reinstate the District Court's dismissal of Plaintiff's ADEA lawsuit. It is precluded by the DHR's dismissal of Solimino's administrative complaint, after a hearing that satisfied the constitutional requirements of due process. The DHR acted in a judicial capacity in providing the parties an adequate opportunity to litigate their issues. Those issues of fact are the same issues as those that Solimino seeks to relitigate in his ADEA lawsuit. Since the New York Courts would give the DHR's fact-finding determination preclusive effect, so should the federal courts. (A.28-A.29).

The doctrine of administrative preclusion is applicable here. Nothing in the language or legislative history of the ADEA evinces an unequivocal Congressional intent to the contrary. The ADEA's procedural scheme for the filing and processing of administrative charges of age discrimination does not conflict with administrative preclusion. A claimant can proceed to court, after complying with Sections 14(a) and 14(b) of the ADEA by restricting his state agency involvement to exploring the possibility of an informal settlement of the dispute. Only the rendition of a finding on the merits by the state agency precludes a federal action, and then only if due process hearing requirements are satisfied; the earlier filing of a federal court ADEA action would stay the state agency proceedings.

[6] Because of its decision that administrative preclusion should not be applied, the Second Circuit did not reach the issue whether the state administrative proceedings in this case satisfied due process and should bind the District Court under principles of administrative estoppel.

[7] The mandate of the Court of Appeals has been stayed pending disposition of this proceeding.

Congress was aware that state agencies had enacted age discrimination statutes when it passed the ADEA. It cited to them approvingly, especially the New York Human Rights Law. If it intended to bar administrative preclusion from a state agency finding, Congress had the ability to do so. It did not elect that option.

Title VII's precedent is inapplicable here. Unlike the ADEA, Congress amended Title VII in 1972, to provide that the EEOC should give "substantial weight" to the findings made in prior state agency proceedings. Since the ADEA lacks such a provision and differs in its procedures from Title VII in several other respects, it should be interpreted to permit administrative preclusion. *See University of Tennessee v. Elliott*, 478 U.S. 788, 795 (1986) (nothing in the language or legislative history of 42 U.S.C. § 1983 "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion.").

ARGUMENT

POINT I

THE COURT OF APPEALS WRONGLY CONCLUDED THAT RESPONDENT'S FEDERAL COURT SUIT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT COULD NOT BE BARRED BY THE EARLIER "NO CAUSE" DETERMINATION OF THE STATE DIVISION OF HUMAN RIGHTS, DESPITE THE ABSENCE OF A CLEAR EXPRESSION OF CONGRESSIONAL INTENT IN THE ADEA TO DENY PRECLUSIVE EFFECT TO SUCH AN ADMINISTRATIVE DETERMINATION.

The District Court correctly held that the DHR's dismissal of Solimino's age discrimination complaint for lack of evidence was binding on a federal court in a subsequent ADEA suit, even though the state agency determination was not reviewed by a court. The District Court's decision rested upon a correct interpretation of this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). It should be approved by this Court.

A. The Doctrine of Common Law Administrative Preclusion Is Well-Established In The Federal Courts.

A long-recognized principle in federal jurisprudence grants preclusive effect to the judgments and records developed during administrative proceedings, including state administrative proceedings. As this Court recognized in *University of Tennessee v. Elliott*:

> [W]e have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Gunter v. Atlantic Coast Line R.Co.*, 200 U.S. 273, 289-291 (1906). Although § 1738 is a governing statute with regard to the judgments and records of state courts, because § 1738 antedates the development of

> administrative agencies, it clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect.

478 U.S. at 794-95.

Preclusive effect is crucial in avoiding duplicative proceedings, inconsistent results and dilatory relitigation of previously decided issues. As this Court held in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), in considering whether preclusive effect should be granted to a finding of the Advisory Board of Contract Appeals, which was adverse to a claimant:

> This is no more than our decision in *Carlo Bianchi* [*United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963)] requires. We held there that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were to be reviewed by that court on the administrative record. *These same reasons support the finality, in a suit for delay damages, of all valid and appropriate administrative findings already made in the course of resolving a dispute "arising under" the contract.*

384 U.S. at 420 (emphasis added).

The Court then reiterated the long-standing rule that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; *Hanover Bank v. United States*, 285 F.2d 455, 152 Ct. Cl. 391; *Fairmont Aluminum Co. v. Commissioner of Internal Revenue*, 4 Cir., 222 F.2d 622; *Seatrain Lines, Inc. v. Pennsylvania R. Co.*, 3 Cir., 207 F.2d 255 (footnotes omitted).

384 U.S. at 422.

This Court should not abandon the long-established and routinely applied principle of administrative preclusion without unequivocal direction from Congress to do so. As the Eighth Circuit found in *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988):

> "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l. Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, "[s]tatutes which invade the common law *** are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952). In *Allen v. McCurry*, 449 U.S. 90, 97, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980), the Court noted that as early as 1871 "res judicata and collateral estoppel could certainly have applied in federal suits following state-court litigation between the same parties or their privies ****" Although *Allen* involved preclusion under 28 U.S.C. § 1738, the Court in *Elliott* stated that the result would have been the same had common-law principles been involved.

843 F.2d at 280-81 (footnote omitted).

As we discuss next, *Elliott* illustrates the Court's recent application of the doctrine of administrative preclusion in the employment context.

B. This Court's Decision In Elliott Demonstrates The Need For A Clear Showing Of Congressional Intent To Overcome The Application Of Administrative Preclusion.

In *University of Tennessee v. Elliott*, the plaintiff filed an administrative charge under state law contesting his proposed discharge. Prior to the beginning of the state administrative

hearing, plaintiff filed suit in federal district court under Title VII and 42 U.S.C. § 1983, alleging that his proposed discharge was racially motivated. The district court permitted the state agency proceedings to go forward. Following the state administrative hearing, it was determined that the proposed discharge was not racially motivated. Elliott did not seek review of this decision in state court, but instead returned to federal court.

This Court stated that whether a judicially unreviewed state administrative determination is to be given preclusive effect depends upon Congressional intent. 478 U.S. at 796. To ascertain Congress' intent, the Court analyzed the language and legislative history of Title VII. Citing the language of 42 U.S.C. §2000e-5(b), requiring the EEOC to give "substantial weight" to prior state proceedings, the Court observed that it was inconsistent to accord state agency findings only "substantial weight," yet give them preclusive effect in a federal court suit.[8] Thus, with respect to the Title VII claim, the Court concluded that Congress did not intend unreviewed state administrative agency findings to be binding upon a federal court in a Title VII suit.

With respect to Elliott's § 1983 claim, however, the Court reached the opposite conclusion. The Court stated:

> "[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. . . .
>
> "Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion."

[8] The Court also referred to its discussion in *Chandler v. Roudebush*, 425 U.S. 840 (1976), of the 1972 amendments to Title VII, where the "plain meaning of the statute," *id.* at 848, written against a "backdrop of focused debate", *id.* at 852, with committee bills and reports revealing a "thorough and meticulous consideration of the question. . . and an unambiguous choice", *id.* at 853-854, caused the Court to hold that Title VII, as amended, granted federal employees the same right to de novo trials in federal court that was enjoyed by private sector employers. 478 U.S. at 795. No such language or legislative history is found with respect to the ADEA.

478 U.S. at 797, *quoting Allen v. McCurry*, 449 U.S. 90, 97-98 (1980).

Thus, *Elliott* requires the application of common-law rules of preclusion to unreviewed state administrative agency determinations, absent an explicit showing of Congressional intent to the contrary. As we show below, since the ADEA lacks a "substantial weight" provision, and otherwise differs from Title VII, the Court here should reach the same result as it did in *Elliott* with respect to § 1983.

C. The District Court Here Correctly Applied The Principles Enunciated In Elliott To Invoke Preclusion.

Here, applying the reasoning of *Elliott*, the District Court stated:

> *Elliott* teaches that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to 'contravene the common-law rules of preclusion[.]' *Id.*, 478 U.S. at 797, 106 S.Ct. at 3226. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.

(A. 21). As the District Court noted, implicit in *Elliott* is the presumption that existing common-law principles survive a Congressional enactment of a statute except when a contrary Congressional purpose is evident. (A. 21).

The District Court's analysis relied upon the Eighth Circuit's decision in *Stillians, supra*. There, the Court of Appeals held that a state administrative determination, which was not reviewed by a court, precluded a subsequent federal suit under the ADEA. The Court of Appeals stated that, under the Supreme Court's decision in *Elliott*, "when a federal statute does not specifically address a particular issue, in order to decide that issue we must ascertain Congressional intent." 843 F.2d at 280.

The Court in *Stillians* began its discussion with a recognition of the common-law doctrine:

> Thus, when the ADEA was enacted in 1967 preclusion was firmly established in the federal common-law. *Therefore, we begin our analysis of the ADEA with a presumption favoring preclusion. Absent an affirmative showing of Congressional intent to derogate from the common law ADEA claims may be precluded by prior unreviewed state administrative determinations.*

843 F.2d at 281 (emphasis added).

Analyzing the language of the ADEA, the Eighth Circuit observed that the ADEA has no provision similar to the "substantial weight" clause of Title VII[9] , which it said was "one of the major factors" for this Court's refusal in *Elliott* to give preclusive effect to state administrative agency determinations under Title VII. *Id.* The *Stillians* court concluded that while Title VII and the ADEA may be similar in certain other respects, those similarities were not controlling:

> When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar.

843 F.2d at 281-82.

With regard to the absence of unequivocal statements evidencing Congress' intent to abandon the long-standing principles of administrative preclusion of a subsequent lawsuit upon the same issue, the Eighth Circuit in *Stillians* went on to state that:

> In any event, our research has left us with the firm conviction that Congress did not intend to abrogate the common law when it enacted the ADEA. Whether this was by conscious design or by default is really not

[9] 42 U.S.C. §2000e-5(b).

> important. *Prior to the adoption of the ADEA, preclusion was alive and well in the federal common law, and absent a clear showing of Congressional intent to the contrary it should continue on.* Such a showing has not been made in this case.

843 F.2d at 282 (emphasis added).

Since the ADEA lacks a "substantial weight" provision and nothing in the legislative history or the language of the ADEA itself evinced an intent to contravene the common-law rules of preclusion, the Eighth Circuit correctly reasoned that an unreviewed administrative finding was entitled to preclusive effect. 843 F.2d at 282.

Other appellate courts have also stated that the ADEA could be amenable to administrative preclusion as a result of state agency determinations in appropriate cases. In considering whether a finding of a state unemployment insurance appeals board was entitled to collateral estoppel effect under the doctrine of administrative preclusion, the Ninth Circuit, in *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283 (9th Cir. 1986), applied the *Elliott* analysis, stating that a "state administrative determination of a disputed issue of fact is entitled to preclusive effect provided that the state administrative agency acted in a judicial capacity" and provided that the parties had an adequate opportunity to litigate. Discussing the argument that the Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), requires state court review before an agency determination can have a preclusive effect under the ADEA, the Ninth Circuit said:

> We rejected this contention in *Plaine v. McCabe*, 790 F.2d 742, 748 (9th Cir.1986). Plaine relies on *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), and holds that a state administrative determination of a disputed issue of fact is entitled to preclusive effect provided that the state administrative agency acted in a judicial capacity and [the parties] had an adequate opportunity to litigate.

Mack, 798 F.2d at 1283.[10]

In *Delgado v. Lockheed-Georgia Co., A Div. of Lockheed*, 815 F.2d 641, *reh'g denied*, 820 F.2d 1231 (11th Cir. 1987), the Eleventh Circuit also considered whether a judicially unreviewed decision of a state administrative agency, which found that the plaintiffs were discharged for violating their employer's rules of conduct, barred relitigation of this issue under the "doctrine of administrative res judicata." 815 F.2d at 646. Rejecting the argument of the EEOC, which participated as *amicus curiae*, that *Elliott* conclusively established that state administrative agencies never could have a preclusive effect in a subsequent federal court lawsuit under the ADEA, the Eleventh Circuit found that:

> Nevertheless, the Court has frequently fashioned federal common law rules of preclusion where § 1738 does not apply. In the context of administrative fact-finding, the Court has upheld issue preclusion in subsequent lawsuits where the administrative agency acted in a judicial capacity in resolving disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. *Id.* at ____, 106 S.Ct. at 3226, 92 L.Ed.2d at 645-46, quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966).

815 F.2d at 646.[11]

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[10] Administrative preclusion ultimately was denied in *Mack* because the nature of the administrative proceedings did not warrant estoppel (i.e., the parties lacked an incentive to litigate the age discrimination claim before the Unemployment Insurance Appeals Board and engaged in informal administrative proceedings without a record to disclose whether evidence regarding age discrimination was introduced), rather than because the ADEA precluded its applicability. 798 F.2d at 1283-84.

[11] Like the Ninth Circuit in *Mack*, the Eleventh Circuit in *Delgado* did not finally determine "whether the findings of a state administrative agency should be denied preclusive effect in all cases [under the ADEA] because the findings at issue here [were] not the result of proceedings before a state agency charged with the enforcement of state age discrimination laws." *Delgado*, 815 F.2d at 646-47.

(Footnote continued)

The mere silence of Congress is insufficient to permit an unsuccessful claimant to escape the final administrative determination of his age discrimination claim. Consequently, the traditional doctrine of administrative preclusion should apply to bar a suit under the ADEA by a litigant who vigorously pursued *formal* administrative remedies before the state agency and who insisted upon and participated in adversarial litigation. The state agency evidentiary hearing demanded by and granted to Mr. Solimino far exceeded the brief, informal settlement efforts which would justify the ADEA's provisions for free and early recourse to the federal court. Solimino elected a state remedy and should be subject to the salutary repose of administrative preclusion.

D. Inappropriate Comparisons With Title VII Shed No Light On Congressional Intent Respecting The ADEA.

Both the district court below and the *Stillians* court rejected an analysis based on a comparison of the ADEA with Title VII. As stated in *Stillians*:

> We should not reason by analogy when interpreting statutes. The proper analysis is to examine the ADEA on its own for expressions of Congressional intent rather than merely compare and contrast it with Title VII.

843 F.2d at 281 (footnote omitted).

The Second Circuit here (in its "Fourth" point, A.8-A.10; 901 F.2d at 1151-52) and the Seventh Circuit in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987), erroneously sought to interpret the ADEA in parallel with Title VII. It is not appropriate to do so in light of their different origins and widely divergent procedural schemes. Even if it were appropriate, such a comparison fails to recognize the distinct origins of the two laws. The ADEA's enforcement provisions are derived from the Fair Labor Standards Act ("FLSA"), rather than Title VII. Thus, a comparative analysis of Title VII and the

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In a pre-*Elliott* decision, the Fourth Circuit concluded that administrative preclusion should not apply in a suit brought under the ADEA against a department of the federal government. *Rosenfeld v. Department of the Army*, 769 F.2d 237 (4th Cir. 1985), *criticized*, *Stillians v. State of Iowa*, 843 F.2d at 281 n.4.

ADEA sheds no light on Congressional intent to contravene the common-law rules of preclusion with regard to the ADEA.[12]

Congress in Title VII gave to the EEOC the authority to *investigate* and to *make findings* as to whether there is reasonable cause to believe that a charge of discrimination under Title VII is true. 42 U.S.C. § 2000e-5(b). In contrast, under the ADEA, the Secretary of Labor (and later the EEOC) was not authorized to make administrative findings. Instead, the Secretary was directed simply to seek to effect voluntary compliance through informal methods of conciliation, conference and persuasion. 29 U.S.C. § 626(b). Thus, as envisioned by the ADEA's drafters, he was to act as a mediator. S.Rep.No. 723, 90th Cong., 1st Sess. 5 (1967); H.Rep.No. 805 90th Cong., 1st Sess. 5 (1967); 113 Cong. Rec. 31,248 (1967).

If the Secretary's informal efforts to effect a settlement failed, the complainant had a judicial remedy available to him (unless the Secretary filed suit under § 7(c)(1)).[13] Thus, the early and unrestricted availability of a federal judicial remedy under the ADEA was premised on a brief, unsuccessful effort by federal officials to mediate a settlement, without formalities or findings of cause.

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[12] Senator Javits, speaking in support of S. 830, 90th Cong., 1st Sess. [a draft bill of the ADEA] stated:

> The enforcement techniques provided by S. 830 are directly analogous to those available under the Fair Labor Standards Act; in fact, S. 830 incorporates by reference, to the greatest extent possible, the provisions of the Fair Labor Standards Act.

113 Cong. Rec. 31,254 (1967).

Later, in response to a question whether a conflict would develop in the administration of the statute with Title VII, Senator Javits responded:

> I do not think this presents any particular problem. The Civil Rights Act of 1964 does not cover age discrimination, and S. 830 does not cover racial or religious discrimination. *The laws will operate completely independently of each other, as will the enforcement procedures.*

Id. at 31,255. (emphasis added). See, generally, *Lorillard v. Pons*, 434 U.S. 575, 585 (1978).

[13] 29 U.S.C. § 626(c)(1)

The comparative analysis of Title VII with the ADEA relied on by the Second Circuit and the *Duggan* court is unwarranted. So, too, is the Second Circuit's conclusion that administrative preclusion should be denied because less time was provided for administrative proceedings under the ADEA than under Title VII. (A.10-A.12; 901 F.2d at 1152-53).

E. The Second Circuit's Reasoning Is Incorrect.

The Second Circuit relied upon three provisions of the ADEA – § 14(a), § 14(b) and § 7(d)[14] – to support its finding that Congress did not intend the common-law rules of preclusion to apply. Its reliance is misplaced.

1. ***Contrary to the Second Circuit's conclusion, § 14(a) was enacted to protect employers by reducing litigation, not to protect grievants by facilitating it.***

Contrary to the Second Circuit's finding (A.7-A.8; 901 F.2d at 1151), the legislative history of § 14(a) clearly shows that Congress was not concerned with the issue of preclusion. Instead, its concern was with protecting employers from a multiplicity of suits:

> Furthermore, commencement of an action under this act shall be a stay on any State action previously commenced. *This provision will protect employers, such as those engaged in the transportation industry, from having to defend against a multiplicity of suits in various State courts when they operate simultaneously in several States.*

S. Rep. No. 723, 90th Congress, 1st Sess. 6 (1967), *reprinted in* Legislative History of the Age Discrimination in Employment Act, at 106, United States Equal Opportunity Commission (1981)(emphasis added); *accord*, 113 Cong. Rec. 31,251 (Yarborough)(Conf. Committee Report).

The Second Circuit did not cite any portion of the ADEA's legislative history to support this conclusion.

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[14] These sections of the ADEA were discussed by the Second Circuit in its "First," "Second" and "Sixth" points in its reversal of the District Court's dismissal of the Complaint.

Instead, the Court of Appeals cited *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), for the proposition that referral to the administrative agency was intended to provide an opportunity for voluntary conciliation satisfactory to the grievant. 441 U.S. at 756. This citation and the Second Circuit's analysis wholly ignores the operation of § 14(a), which applies only to those cases where a charging party has filed a federal lawsuit while the state proceedings are still pending. It is the filing of "an action under this chapter" that "supersedes any state action." 29 U.S.C. § 633(a). Thus, § 14(a) has no relevance to cases, such as this one, in which the state administrative agency has *completed* its processing of the age discrimination charge and dismissed a meritless complaint before any court proceeding is initiated.

Had he wished to exercise his right to bring suit under the ADEA, Mr. Solimino should have opted out of the state proceedings earlier and filed suit in federal district court; as long as he did so prior to issuance of an adverse state administrative finding, this filing would have stayed the state proceeding. 29 U.S.C. § 633(a). Instead, Solimino elected to vigorously litigate his claims before the state agency and did so through an administrative appeal. By the time he filed his federal suit, there was no longer any "state action" to supersede. He cannot now invoke § 14(a), therefore, to escape the consequence of his choice of remedial schemes.

2. *Contrary to the Second Circuit's conclusion, the sixty-day referral provision of § 14(b) does not evince a Congressional intent to override administrative preclusion.*[15]

Section 14(b) imposes a minimal limitation upon a grievant's ability to commence a civil action under the ADEA. He need wait only sixty days, scarcely enough time to permit the EEOC or the state agency to explore voluntary conciliation of the administrative charge. Furthermore, this period can be shortened if the state authority to which the charge was referred terminates its proceedings sooner. 29 U.S.C. § 633(b). "Terminate" may include an administrative decision, for whatever reason, to halt

[15] A.6-A.7; 901 F.2d at 1150-51 ("First" point).

conciliation efforts. It also may result from the claimant's refusal to participate in any state agency adjudicatory proceeding. *See E.E.O.C. v. Commercial Office Products, Inc.*, 486 U.S. 107, 115 (1988). If the state process were abandoned for any reason, then a federal court action under the ADEA could proceed. *See Oscar Mayer & Co. v. Evans*, 441 U.S. at 761 ("Section 14(b) does not stipulate an exhaustion requirement. The section is intended only to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief.").[16]

From the legislative history of the ADEA, it is evident that the purpose of the §14(b) referral provision was simply to allow a state administrative agency a brief period of time, not to exceed sixty days, in order to explore voluntary conciliation. Representative Perkins' Report to accompany H.R. 13054 clarifies the purpose of the initial sixty day "waiting period" and states:

> As was stated, aggrieved persons may similarly bring actions but a condition precedent to the bringing of action by an individual, is notice to the Secretary and the elapse of a period of 60 days. *This is to allow the Secretary to mediate the grievance.*

H.R. Rep. No. 805, 90th Cong., 1st Sess. 5 (1967)(emphasis added).[17]

[16] This case does not present the same issue as *Oscar Mayer* because there no factual adjudication by the state referral agency ever took place upon the allegations set forth in Mr. Evans' charge of age discrimination. This Court held that it would be inappropriate to bar an ADEA claim because a proceeding was time-barred under a shorter state statute of limitations. 441 U.S. at 762. In contrast, where, as here, the state agency makes final factual findings upon the substantive allegations of age discrimination, collateral estoppel should bar relitigation of those same issues in an ADEA action.

[17] The state authorities could perform this function under the referral provision. However, the ADEA also provides that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions" in the enforcement of state age discrimination laws. 29 U.S.C. § 633(a).

Referral for mediation, as was envisioned by the drafters of § 14(b), is consistent with the principle of preclusion. If a claimant chooses to participate in adjudicatory administrative proceedings that afford him due process, he should be bound by that final administrative result. As the Eighth Circuit stated in *Stillians*:

> Keeping in mind the presumption in favor of retaining long-standing common law principles, we find it highly probative that nothing in the ADEA is inconsistent with administrative preclusion. In fact, preclusion is consistent with the ADEA. For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, *it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738, or filing suit anew in the federal district court.* Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation. *Cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478, 102 S. Ct. 1883, 1895, 72 L.Ed. 2d 262 (1982) (giving finality to state court judgments increases parties' incentive to pursue review in state courts).

843 F.2d at 282. (emphasis added)

3. *Contrary to the Second Circuit's conclusion, Congress did not disapprove of existing state age discrimination laws in passing the ADEA.*

The Second Circuit incorrectly concluded that Congress "intended the federal courts to give no preclusive effect to the judicially unreviewed fact-finding of a state administrative agency" by ignoring the favorable citations in the legislative history to

New York's Human Rights Law and the growing body of state age discrimination laws and concluding that the ADEA was enacted to remedy what it perceived to be a patchwork of inadequate state laws. (A.8; 901 F.2d at 1151, "Third" point). There is nothing in the legislative history to support such a conclusion.

From the legislative history of the ADEA, it is plain that Congress looked with approval on state legislation prohibiting age discrimination during its consideration of the Act. For example, in his Report to accompany H.R. 13054, Rep. Perkins, noted that at the time: (1) "24 States [ ] have age discrimination legislation" of the type proposed in the ADEA. In the Report, Rep. Perkins went on to state that "[t]he overall reaction to the [state] laws is favorable," citing a survey conducted by the Manpower Administration of the Department of Labor in May-June, 1963. H.R.Rep.No. 805, 90th Cong., 1st Sess. 2 (1967); S.Rep.No. 723, 90th Cong., 1st Sess. 2 (1962). *Accord*, *Kremer*, 456 U.S. at 473 ("Indeed, New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination.")(footnote omitted); *Age Discrimination in Employment: Hearings on S. 830 Before the Subcomm. on Labor & Public Welfare*, 90th Cong., 1st Sess. 24 (1967) (statement of Jacob Javits, Sen.) ("Under these measures, the States have had broad success in reducing age discrimination and expanding job opportunities for older workers."); 113 Cong. Rec. 31248, 31250 (Yarborough, presenting Committee report No. 723)(Nov. 6, 1967).

4. *An ADEA complainant can preserve his right to sue in Federal Court, despite federal or state administrative proceedings.*

The Second Circuit, without citing supporting authority, incorrectly found that since a grievant lacked "control over the EEOC's decision to refer the case to the state agency," he should not be precluded by that agency's finding from proceeding with an ADEA lawsuit in federal court. (A.10; 901 F.2d at 1152, "Fifth" point). This conclusion ignores the ability of an ADEA claimant to insist that the EEOC or the state authority proceeding

be limited to exploring of the possibility of conciliation or settlement. *See Oscar Mayer & Co. v. Evans*, 441 U.S. at 761. Administrative preclusion is fully appropriate, therefore, when the claimant chooses to participate fully in an adjudicatory proceeding that results in a finding that is a final determination in the merits under state law. *Stillians v. State of Iowa*, 843 F.2d at 282 ("If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738, or filing suit anew in the federal district court.").

The Second Circuit also concluded (in its "Fourth" point) that because a decision neither of the EEOC nor of a state administrative agency would have preclusive effect under Title VII, de novo federal court review should not be precluded in an ADEA action. (A.8-10; 901 F.2d at 1151-52). The Court's conclusion is faulty. Once again, the Second Circuit's finding is based upon inapplicable interpretations of Title VII.

While the ADEA's substantive provisions may have been based, in part, on Title VII, judicial interpretations of Title VII do not dispose of the specific issue raised here. The question in this case is answered only by interpretation of the ADEA's own procedural scheme. As discussed above, at pp. 14-15, the ADEA has no "substantial weight" provision that is comparable to § 706(b), 42 U.S.C. § 2000e-5(b) of Title VII. Furthermore, provisions involving referral of an ADEA administrative charge to an appropriate state authority are procedural, rather than substantive, in nature.

Since the deferral procedure (and sequential processing of charges) of Title VII is substantially different than the referral procedure (and concurrent processing of charges) of the ADEA, no weight should be accorded Title VII precedent. For the same reason that the district court rejected the Seventh Circuit's reasoning in *Duggan*, that it "improperly conflates the issues of 'deferral' and 'preclusion'" (A.26), this Court should reject the Second Circuit's improper interpretation of the ADEA. Under Title VII, deferral to a state agency provides it only with

the "first crack" at the claim. Preclusion of a claim under the ADEA gives the state agency the "last word" on the claim "in a limited class of cases (i.e., those in which the state agency rules within 60 days, or rules after 60 days, but before the claimant files a federal action. *See* 29 U.S.C. § 633(a) and (b).)" (A.26).

Accordingly, the principle of non-preclusion developed in Title VII deferral cases cannot be transplanted to the ADEA.

5. *Application of administrative preclusion does not diminish the degree of protection available to a grievant under the ADEA.*

In the sixth justification for its determination, the Second Circuit catalogues what it sees as greater "grievant-protectiveness" under the ADEA than under Title VII. These protections, that Court contends, "indicat[e] a congressional intent to allow ADEA grievants earlier and freer access to federal court than Congress has allowed Title VII grievants." (A.10-A.11; 901 F.2d 1152). This, the circuit court says, indicates that Congress intended that prior agency fact-finding not judicially reviewed should not have preclusive effect. *Id.*

The Second Circuit is incorrect in its conclusion. Administrative preclusion does *not*, in fact, interfere with earlier and freer access to federal court. Its applicability to a proceeding merely directs a claimant to elect between an administrative or a judicial remedy. There is no interference with access to the courts if the grievant chooses to institute a civil action before the state agency has issued a final determination. No ADEA plaintiff who elects to seek a judicial remedy at the conclusion or termination of the statutory sixty-day review period is barred from suit in the federal court absent a state agency adjudication on the merits of the same issue after a fairly litigated proceeding. 29 U.S.C. § 633(b). If the claimant were to participate in an adjudicatory proceeding, then:

> In situations where the state is able to resolve a dispute within sixty days, the petitioner would be barred from federal court, but all of the purposes of the ADEA,

> including prompt resolution of discrimination claims, would be served.

Stillians, 843 F.2d at 282.

Here, Solimino had his choice, at any time after sixty days and before the rendering of a decision, to proceed with the state agency proceeding or to bring an action in federal court. He elected to entrust his matter to the DHR.

F. This Court's Decision in Kremer v. Chemical Construction Corp. Does Not Prevent Application Of Administrative Preclusion In Actions Under The ADEA.

In *Kremer*, the Supreme Court was called upon to answer a specific and narrowly focused question, which it answered in the affirmative:

> The principal question presented by this case is whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738. Specifically, we decide whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the State's own courts.

456 U.S. at 463. Thus, this Court was *not* called upon to determine whether preclusive effect should be given to an administrative agency's final determination and dismissal of a charge of *age* discrimination.

While the Court questioned the preclusive effect to be given to an unreviewed agency finding, it did not do so in the context of an ADEA proceeding. 456 U.S. at 469,n.7. Since the remedial schemes under Title VII and the ADEA are significantly different, the Court's comment in *Kremer* is inapplicable. *Stillians*, 843 F.2d at 281-82 ("When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statute may be similar.").

POINT II

THE STATE DIVISION OF HUMAN RIGHTS' PROCEDURES IN THIS CASE SATISFIED THE DUE PROCESS CLAUSE, AND THUS ITS DETERMINATIONS ARE ENTITLED TO PRECLUSIVE EFFECT.

The District Court held that the DHR's procedures satisfy due process and, therefore, its determinations are entitled to preclusive effect. (A. 28-29). The Second Circuit, having decided that the ADEA was incompatible with administrative preclusion, did not reach the issue.

The District Court's holding is amply supported by the facts and applicable precedent. *Kirkland v. City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987); *see Rabinovici v. State of New York*, 108 Misc.2d 664, 665 (N.Y. Ct. Cl. 1981) ("Subdivision 7 of section 295 of the Executive Law provides that the Division may hold hearings, provide for cross-interrogatories, subpoena witnesses, compel their attendance, administer oaths, take testimony and require the production for examination of book or papers. . . .These are manifestly judicial or quasi-judicial functions. . . ."); *Allied Chemical, an Operating Unit of Allied Corp. v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271 (1988), *cert. denied*, 488 U.S. 1005 (1989) (giving preclusive effect to a decision of the State Public Service Commission, which was not reviewed by a Court.)[18] The DHR had statutory

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[18] Solimino cannot avoid the preclusive effects of the DHR's determination by declining to seek review in the state courts. As the Court of Appeals held in *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986):

> That the California Corporation Commissioner's decision here was not reviewed by a state court does not diminish its preclusive effect in federal court. Plaine could have sought state court review of the Commissioner's decision, Cal. Code Civ. Proc. § 1094.5 (West Supp. 1985), but chose not to do so. *If an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administrative decision simply by foregoing her right to appeal.*

797 F.2d at 719, n.12 (emphasis added). *Accord*, *DeCintio v. Westchester Co. Medical Center*, 821 F.2d 111-116 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987); *Eilrich v. Ramas*, 839 F.2d 630, 632 (9th Cir.), *cert. denied*, 488 U.S. 819 (1988) (Claimant's decision not to seek court review of an administrative proceeding does not bar application of the doctrine of administrative preclusion).

authority to adjudicate Solimino's complaint of age discrimination, and acted in a judicial or quasi-judicial capacity in determining that Solimino's complaint was groundless. (A.28-A.29, *citing Kremer*, 456 U.S. at 479-85 and *Kirkland* 828 F.2d at 107-09). Solimino had a full and fair opportunity to litigate his complaint at a hearing before the DHR. (A.28-A.29). The courts of the State of New York would give preclusive effect to the DHR's determination. *Hecht v. Monaghan*, 307 N.Y. 461 (1954). Thus, the requirements of due process have been met.

After dismissal of his age discrimination claim, Solimino appealed to the Human Rights Appeal Board. The Board affirmed the dismissal of his age discrimination complaint. Mr. Solimino then had the right, under New York law, to seek review in the Appellate Division of the State Supreme Court. He did not do so. Since Solimino had the right to appeal the state agency dismissal, he cannot escape preclusion of his subsequent ADEA claim. His decision not to seek review by the New York courts, after having been advised of its availability, should not shield him from the preclusive effect of the administrative ruling. *Plaine*, 797 F.2d at 719.

CONCLUSION

Since nothing in the ADEA prevents application of the doctrine of administrative preclusion and Solimino received an administrative hearing which satisfied the requisites for constitutional due process, the "no cause" determination of the DHR bars his suit under the ADEA. Thus, for the reasons set forth above, Petitioner prays for an order vacating the order of the United States Court of Appeals for the Second Circuit and reinstating the decision and order of the United States District Court for the Eastern District of New York dismissing this action.

Dated: February ____, 1991
Jericho, New York
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Respectfully submitted,

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